

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

IN RE:)	Chapter 11
)	
W.R. GRACE & CO., et al.,)	Case No. 01-1139(JKF)
)	
Debtors.)	Jointly Administered
)	
_____)	

**STATEMENT OF POSITION OF BNSF RAILWAY COMPANY REGARDING PLAN
PROPONENTS' MOTION FOR CLARIFICATION OF CONFIRMATION ORDER
[DOCKET NO. 26236] AND PRECAUTIONARY MOTION FOR EXTENSION OF TIME
TO FILE OBJECTIONS TO OR APPEAL FROM MEMORANDUM OPINION AND
RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW
[DOCKET NO. 26239]**

BNSF Railway Company ("BNSF") submits this statement in response to the Plan Proponents' Motion For Clarification Of Confirmation Order [Docket No. 26236] And Precautionary Motion For Extension Of Time To File Objections To Or Appeal From Memorandum Opinion And Recommended Findings Of Fact And Conclusions Of Law Of Bankruptcy Judge [Docket No. 26239], and states as follows:

1. On January 31, 2011, the Court entered The Memorandum Opinion Regarding Objections To Confirmation Of First Amended Joint Plan Of Reorganization And Recommended Supplemental Findings Of Fact And Conclusions Of Law (the Memorandum Opinion) [Docket No. 26154] And The Recommended Findings Of Fact, Conclusions Of Law And Order Regarding Confirmation Of First Amended Joint Plan Of Reorganization As Modified Through December 23, 2010 (the Recommended Findings) [Docket No. 26155].
2. The Memorandum Opinion and Recommended Findings are ambiguous as to whether they constitute final, appealable orders, or are recommendations to the District Court.

3. The Memorandum Opinion concludes, “

All objections not addressed herein having been resolved, and the court finding no merit to those addressed herein, the court *recommends* that the District Court confirm Plan Proponents’ Amended Joint Plan.

Mem. Op. at p. 79 (emphasis added).

4. The Recommended Findings conclude, “

Wherefore the court respectfully *recommends* that the United States District Court for the District of Delaware prove these [Recommended Findings]. We further recommend that the District Court confirm the Joint Plan and issue the § 524(g) injunction.

Recommended Findings at p. 77 (emphasis added).

5. By contrast, elsewhere in the Recommended Findings, the Court states,

“The Plan and each of its provisions . . . are CONFIRMED” Recommended Findings at p. 9.

6. Accordingly, as a result of this ambiguity, objectors are unsure whether the Memorandum Opinion and Recommended Findings constitute appealable final orders, such that a notice of appeal must be filed no later than February 14, 2011, or if they are non-appealable orders for which no notice of appeal must be filed.

7. If non-appealable orders, it is unclear what, if any, objection deadline applies for interested parties to file objections to the Recommended Findings. Rule 9033 provides a procedure for filing objections to recommended findings of fact limited, however, to non-core proceedings, but confirmation of a plan constitutes a core proceeding.

8. As a result, the Debtors have filed a motion seeking entry of an order “clarifying,” retroactively to February 14, 2011, that the Memorandum Opinion and

Recommended Findings constituted final, appealable orders, and as such the appeal deadline will expire on February 14, 2011.

9. AXA Belgium has also filed a motion, seeking an extension of time to either file appeals (if the order is a final, appealable order) or to file objections under Rule 9033 (if such rule applies).

10. However, BNSF has filed a Motion for Reconsideration of both the Memorandum Opinion and the Recommended filings. Having filed the Motion for Reconsideration, the time for appeal will not run from the entry of the Memorandum Opinion and Recommended Findings, but rather will commence from the entry of the order disposing of the last such motion outstanding. Bankruptcy Rule 8002(b).

11. In any event, any order entered by this Court regarding the Plan Proponents' "Request for Clarification" or AXA Belgium's request for an extension of time, cannot be in derogation of interested parties' rights. Clearly, it would strain fundamental concepts of due process and established Federal appellate practice to either enter an order on the very day that an applicable deadline would expire, or to retroactively "clarify" as the Debtors suggest, by ruling that such deadline applies.

Dated: February 11, 2011
Wilmington, Delaware

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